IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DANIEL LEE DUCHESNEAU, Appellant.	No. 33783-5-II UNPUBLISHED OPINION

Houghton, P.J. – Daniel Lee Duchesneau appeals his conviction of fourth degree assault, arguing that he was entitled to but did not receive a unanimity or *Petrich* instruction. *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).[1] Because the charging documents and the prosecutor's closing argument establish that the State elected the act supporting the fourth degree assault charge, Duchesneau was not entitled to a unanimity instruction and we affirm the conviction.

FACTS

Following an altercation with his wife Stephanie, the State charged Duchesneau by third amended information with (1) second degree assault - domestic violence (count I), (2) fourth degree assault - domestic violence (count II), (3) unlawful imprisonment - domestic violence

[1] Duchesneau was also convicted of misdemeanor harassment, but he does not raise any issues related to this conviction on appeal.

(count III), and (4) felony harassment - domestic violence (count IV). In count I, the State alleged that Duchesneau had committed second degree assault by assaulting Stephanie *with a deadly weapon*, specifically a "Lugar .30 caliber semi automatic pistol." Clerk's Papers (CP) at 18. In count II, the State alleged that he had committed fourth degree assault by intentionally assaulting Stephanie; there was no allegation that a weapon or firearm was related to this assault.

Duchesneau pleaded not guilty to all four charges, and the case proceeded to a jury trial. During the trial, the State presented evidence of two assaultive acts by Duchesneau against Stephanie on the evening of February 27, 2004.

The evidence suggested that the first incident occurred during a family argument when Duchesneau pushed Stephanie across the room into a filing cabinet and then attempted to choke her. The second incident occurred a short time later, after the two initially separated, when Duchesneau called Stephanie into their bedroom and threatened her with a handgun.

After both parties rested, the trial court instructed the jury that each count was a separate offense, that it "must decide each count separately" and that its "verdict on one count should not control [its] verdict on any other count."[2] CP at 26 (court's instruction 3). The trial court also gave the following instruction defining assault:

> An assault is an intentional touching or striking or shooting of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking or shooting is offensive if the touching or striking or shooting would offend an ordinary person who is not unduly sensitive.
>
> An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.
>
> An assault is also an act, with unlawful force, done with the intent to create

[2] The record does not show whether either party requested a unanimity instruction.

> in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP at 33 (court's instruction 10).

As to count I, the second degree assault charge, the trial court's instructions required the jury to find that Duchesneau intentionally assaulted Stephanie *with a deadly weapon*. It further instructed the jury that the term "deadly weapon" included firearms. As to count II, the fourth degree assault charge, the trial court's instructions required the jury to find only that Duchesneau assaulted Stephanie without mention of a firearm or weapon.

In closing argument, the prosecutor emphasized that the evidence demonstrated two separate assaults, one occurring when Duchesneau pushed Stephanie against the wall and file cabinet and attempted to choke her, the other when he threatened her with the gun.[3] In his

[3] Specifically, the prosecutor argued:

> Instruction No. 8 describes -- or, defines the crime of Assault in the Second Degree. And that is simply defined as when a person intentionally assaults another with a deadly weapon.
>
> And the next instruction along that line is what's called the to-convcit instruction. And that says that on or about the 27th day of February, 2005, the defendant intentionally assaulted Stephanie Duchesneau with a deadly weapon.
>
> It also says that Stephanie Duchesneau was a family or household member. That's not in question at all. . . . And that the act occurred in the state of Washington.
>
> So you're given three elements that you must find beyond a reasonable doubt, the key one being that he intentionally assaulted her with a deadly weapon.
>
> And I would refer you to instruction No. 10, which defines "assault" in a number -- three different ways, one of which is an intentional touching, striking or shooting of another person that is harmful or offensive, regardless of whether any physical injury is done.
>
> Now, the pointing of the deadly weapon at Stephanie Duchesneau, she wasn't shot, obviously, but this definition of "assault" encompasses the charge of Assault in the Fourth Degree that you're also going to be asked to decide upon, and that is clearly met by her testimony that he took her, grabbed her, choked her, cut off her air to the point where she was gasping and saw stars.
>
> Another aspect of assault that is defined here is also an act done with the intent to create in another an apprehension or fear of bodily injury and which, in fact, does that.
>
> Now, this is the Assault in the Second Degree, this is the intentional assault

closing argument, defense counsel also distinguished the two assault charges, characterizing the second degree assault as the assault with the gun and the fourth degree assault as the choking incident.

The jury acquitted Duchesneau of the second degree assault and the unlawful imprisonment charges, but convicted him of the fourth degree assault and harassment charges. Duchesneau appeals.

ANALYSIS

Duchesneau contends that because the evidence suggests more than one assault, he was entitled to a *Petrich* or unanimity instruction and that the trial court erred in failing to give this instruction.[4] We disagree.

A jury may convict a defendant only if it is unanimous in finding that the defendant committed the act charged in the information. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d

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> that he's accused of and which Ms. Duchesneau says when she goes into the bedroom, has that gun trained on her at her stomach a few feet away, she knows it's probably loaded because she's heard him playing with it before she even goes into the room, and ask yourself it there is any other way that someone could not be in reasonable apprehension or fear of assault or serious injury when that gun is pointed at them less than a few feet away.
>
> And if you consider her testimony, you'll -- you should be able to find that that aspect of assault has been met as well.
>
> . . . .
>
> So after you go back to the jury room and you are discussing all the evidence, all the testimony, look at credibility, look at what motivates this whole situation, and ask yourselves what went on here, and you should be able to find beyond a reasonable doubt that the defendant is guilty of the crime of Assault in the Second Degree with a Deadly Weapon.
>
> You should be able to find that he's also guilty of Assault in the Fourth Degree for choking her.

VII-B Report of Proceeding at 415-17, 425.

[4] That Duchesneau did not raise this issue at trial or request the instruction does not prevent him from raising it on appeal because the claimed error here is of constitutional magnitude. *State v. Greathouse*, 113 Wn. App. 889, 916, 56 P.3d 569 (2002), *review denied*, 149 Wn.2d 1014 (2003).

105 (1988). "If several acts are alleged, any one of which could constitute the crime charged, the

jury must be unanimous as to which act or incident constituted the crime." *State v. Shouse*, 119 Wn. App. 793, 797, 83 P.3d 453 (2004). If the State does not select, or elect, a single act as the basis for the charge, the trial court must instruct the jury that it must unanimously agree upon a single act that was proven beyond a reasonable doubt. *Petrich*, 101 Wn.2d at 572.

Election of a particular act may be established if the State's closing argument, when considered with the jury instructions and the charging documents, makes it clear which act or acts the State is relying on for which charge and there is no possibility that the jury could have been confused as to which act related to which charge. *State v. Bland*, 71 Wn. App. 345, 352, 860 P.2d 1046 (1993) (State's closing argument clarifying the particular act for each count supported a conclusion that the State made an election).

Here, the charging document clearly charged two separate assaults, count I requiring the use of a firearm and count II requiring only an intentional assault. The evidence arguably showed two separate assaultive acts, one involving a firearm and the other involving the pushing and choking. And the prosecutor, and even defense counsel, clearly connected each assaultive act to a specific charge in closing argument, relating the second degree assault to the alleged assault in the bedroom involving the gun and the fourth degree assault to the pushing and choking incident in the living area of the home.

Because the charging documents, evidence, and closing arguments clearly tied each act to a separate charge, the State elected which charge related to which act and Duchesneau was not entitled to a unanimity instruction. Accordingly, we affirm his fourth degree assault conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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Houghton, P.J.

We concur:

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Bridgewater, J.

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Hunt, J.